TSOI PING KWAN

v.

LOH LAI NGOH & ANOR.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: B-03-49-1996]
20 MAY 1997

CIVIL PROCEDURE: *Injunction - Mareva injuction - Prerequisites for grant of - Whether there was serious risk of dissipation of assets - Whether balance of justice favoured grant of injunction*

CIVIL PROCEDURE: *Appeal - Interlocutory appeal - Adducement of fresh evidence - Test in Ladd v. Marshall - Whether complied with - Whether applicable to interlocutory matters*

This was an appeal by the appellant against the High Court's refusal to grant a *Mareva* injunction against the respondent.

The issues were: (i) whether the appellant had established that there was a serious risk or danger that the respondent would dissipate their assets to avoid meeting any judgment that might be obtained against them; and (ii) whether the balance of justice favoured the grant of a *Mareva* injunction or its refusal.

The initial issue that had to decided by the court was whether the first respondent could admit fresh evidence. The motion taken out by the first respondent seeking to admit three documents was opposed by the appellant. It was submitted by the appellant that the test laid down by *Ladd v. Marshall* [1954] 3 All ER 745 had not been met.

Held:
Per Gopal Sri Ram JCA

[1] The *Ladd & Marshall* test does not apply to interlocutory matters and the motion sought by the first respondent was allowed.

[2] The appellant had failed to establish that there was a serious risk of dissipation of assets by the respondents.

[3] The learned Judge had exercised his discretion correctly in refusing the appellant's application for a *Mareva* injunction. The fresh evidence adduced supported the learned Judge's refusal.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Injunksi - Injunksi Mareva - Syarat untuk membenarkan - Samada wujud risiko serius bahawa aset akan dilenyapkan - Samada imbangan keadilan menyokong pemberian Mareva*

PROSEDUR SIVIL: *Rayuan - Rayuan interlokutori - Pengemukaan keterangan baru - Ujian dalam Ladd v. Marshall - Samada dipatuhi - Samada terpakai kepada hal interlokutori*

Ini merupakan rayuan oleh pihak perayu terhadap keputusan Mahkamah Tinggi yang menolak permintaan untuk injunksi Mareva terhadap defenden.

Isu yang dikemukakan kepada Mahkamah ialah: (i) samada responden pertama boleh mengemukakan keterangan baru untuk diterima masuk pada tahap rayuan; (ii) samada perayu telah menunjukkan bahawa ada risiko serius atau bahaya yang responden akan melenyapkan aset untuk mengelak daripada memberi kesan kepada sebarang penghakiman yang didapati terhadap mereka; dan (iii) samada keadilan menyokong pemberian Mareva atau penolakannya

Di peringkat awalnya, isu yang perlu diputuskan oleh Mahkamah ialah samada keterangan baru boleh dikemukakan oleh responden. Usul yang dibuat oleh responden pertama untuk mengemukakan tiga dokumen telah dibantah oleh perayu. Ianya dihujahkan oleh perayu bahawa ujian yang diputuskan oleh *Ladd v. Marshall* [1954] 3 All E. R. telah tidak dipenuhi.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ujian *Ladd & Marshall* tidak terpakai kepada hal interlokutori dan usul yang diminta oleh responden pertama adalah dibenarkan.

[2] Perayu telah gagal menunjukkan bahawa ada risiko serius yang aset akan dilenyapkan oleh responden.

[3] Hakim yang arif telah menggunakan budibicaranya dengan betul dalam menolak permohonan perayu untuk injunksi Mareva.

[Rayuan ditolak.]

Cases referred to;
Tsoi Ping Kwan v. Medan Juta Sdn. Bhd. & Anor. [1996] 3 MLJ 367 ***(cit)***
Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***
William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor. [1991] 2 MLJ 555 ***(refd)***
Motor Sports Ltd. & Ors. v. Delcont (M) Sdn. Bhd. [1996] 2 MLJ 605 ***(cit)***
Hadmor Productions Ltd. v. Hamilton [1983] 1 AC 191 ***(refd)***

[Appeal from High Court Malaya, Shah Alam; Suit No. 22-147-1996]

For the appellant - Wong Chong Wah (Leong Wai Hung & Lim Koon Hiam with him); M/s. Skrine & Co.
For the first respondent - N. Navaratnam; M/s. Logan Sabapathy & Co.
For the second respondent - C. Abraham (R.S. Nathan with him); M/s. Shearn Delamore & Co.

JUDGMENT

Gopal Sri Ram JCA:

The facts and background relevant to this case have already been set out in the judgment of this Court in an earlier appeal by the same appellant. See, *Tsoi Ping Kwan v. Medan Juta Sdn. Bhd. & Anor.* [1996] 3 MLJ 367 *('Medan Juta No. 1')*. We do not propose to engage in a repetition of them. Suffice to say that the earlier appeal concerned the High Court's decision to remove the caveats entered by the instant appellant while the present case concerns the refusal by the same Court to accede to the appellant's application for a Mareva injunction. This Court, in the course of its judgment in *Medan Juta No. 1,* adverted to the present appeal. See, [1996] 3 MLJ at p. 383.

It is conceded by the respondents (the second respondent being Medan Juta Sdn. Bhd.) that the appellant had made out an arguable case for the grant of a Mareva. There are several issues upon which the disputants before us stand in disagreement. However, we find it necessary to deal with only two of them. The first has to do with the question whether the appellant has established that there is a serious risk or danger that the respondents will dissipate their assets to avoid meeting any judgment that may be obtained against them. The second relates to the question where the balance of convenience or, more appropriately, the balance of justice lies. In other words, whether justice favours the grant of a Mareva or its refusal. Before we address ourselves to the resolution of this question, there are some preliminary matters that call for attention.

In addition to the appeal, there were before us three motions. Two of these were taken out by the appellant. The first was to amend the notice of appeal; the second, sought to admit, as further evidence, the affidavit of the first respondent filed in this Court in *Medan Juta No. 1* pursuant to a direction

made therein. Both these motions were unopposed and the orders sought in each of them were granted.

The third motion was taken out by the first respondent seeking to admit three documents by way of further evidence to show re-payment. It was opposed by the appellant on the ground that the test laid down in *Ladd v. Marshall* [1954] 3 All ER 745 had not been met. *Ladd v. Marshall (supra)* was referred to and applied by the former Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 where Suffian FJ (as he then was) stated the requirements in this way:

> To justify the reception of further evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible.

Now, it must be borne in mind that the *Ladd v. Marshall* test applies to cases where further evidence is sought to be admitted at the appellate level after a trial on merits. It does not apply to interlocutory matters. This is made clear by the judgment of Gunn Chit Tuan SCJ (as he then was) in *William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor.* [1991] 2 MLJ 555, where, when delivering the unanimous decision of the Supreme Court, he said:

> Firstly in so far as the said notice of motion was concerned, we considered that the conditions laid down in *Ladd v. Marshall (supra)* regarding the strict approach for fresh evidence to be admitted on appeal only applies where there has been a trial or hearing on the merits. But where there has not been a trial or hearing on the merits as in this case, the *Ladd v. Marshall* conditions do not apply. But this Court has in any case a full and general discretion whether to admit fresh evidence ...

The present appeal comes well within the purview of the exception to the *Ladd v. Marshall* test. The submission by Encik Wong Chong Wah of Counsel for the appellant that the test applies notwithstanding that this is an interlocutory appeal plainly overlooks the decision in *William Jacks (supra)*. We entertained no difficulty in rejecting it and granting the orders sought by the first respondent in its motion.

With that we now turn to deal with the substantive merits of the appeal and to address the two issues argued before us.

So far as the first issue is concerned, the learned Judge found that the appellant had failed to establish that there was a real danger that the respondents will dissipate assets in order to avoid meeting any judgment that may be obtained against them. This is how he put it:

> After a proper perusal of all the affidavits filed herein, I find that there is absolutely no evidence of any other danger of dissipation of the defendants' assets.
>
> The commercial relationship between the plaintiff and the defendants has subsisted for many years. The debt claimed as due arises from remittance to the first defendant that took place in 1991, 1992 and 1993. Since that time, the 1st defendant has been actively involved in business in Malaysia and there is no evidence at all to suggest that Jessie intends to liquidate her business interests.
>
> There must be a serious risk of dissipation. Bare assertions that the 2nd defendant is likely to put any asset beyond the plaintiff's grasp and is unlikely to honour any judgment or award are clearly not enough by themselves: *Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft mbH & Co. KG ('The Niedersachsen')* [1984] 1 All ER 398 at p. 417, per Kerr LJ.

In our judgment the learned Judge was entirely correct in the approach he adopted. We too have scrutinised the affidavits, in particular, those parts of the evidence drawn to our attention by Encik Wong Chong Wah during his submissions. Having done thus, we have arrived at the same conclusion as the learned Judge. We are therefore satisfied that there was no misdirection either on the evidence or the law by the learned Judge. As such we find ourselves unable to agree with the criticism levelled by Encik Wong against the Judge's conclusion on the first issue.

Turning to the second issue, it is to be noted that the learned Judge, after weighing all relevant factors came to the conclusion that the balance of convenience lay in favour of refusing a Mareva. He said:

> Damages are an adequate remedy to the plaintiff as he will be in a position to quantify his claim in money terms if it is found at trial that the 1st defendant was a constructive trustee of his shares. However, the 2nd defendant will be immobilised by the injunction and the damages suffered will not be readily quantifiable. As such damages will not be an adequate remedy to the 2nd defendant and the balance of convenience lies in favour of refusing the injunction.

The learned Judge also took into account the plaintiff's ability to meet the undertaking in damages and made the following observation:

> The plaintiff has failed to show any evidence that his undertaking as to damages is of any worth. He has no assets in this jurisdiction to justify any meaningful offer to account of security for costs including the costs awarded against him in the caveat proceedings. This is yet another factor that militates against the granting of the Mareva injunction in his favour. See *Syarikat Promine Dungun Sdn. Bhd. v. Perbadanan Memajukan Iktisad Negeri Terengganu* [1990] 2 MLJ 18.

Again, we are of the view that this is eminently a correct direction by the learned Judge of himself upon the law and the facts. We have taken into account the fresh evidence adduced before us but find that it does not assist the appellant. On the other hand we find that there is an additional reason in support of the learned Judge's refusal of the injunction.

It is beyond dispute that the appellant, on 23 January 1996 accepted a guarantee in the sum of RM5 million secured by the instant second respondent from Perdana Merchant Bankers Bhd. The terms of that guarantee and the circumstances in which it was given and accepted appear sufficiently in the judgment of this Court in *Medan Juta No. 1*. No useful purpose will be served by their regurgitation. Suffice to say that the appellant having accepted the guarantee, it would be unjust and inequitable to impose a further restraint upon the respondents. A Court should always be careful to ensure that the Mareva form of relief is not used as an instrument of oppression. See, *Motor Sports Ltd. & Ors. v. Delcont (M) Sdn. Bhd.* [1996] 2 MLJ 605.

At the end of the day this is really an appeal against the exercise of discretion by the Judge. In cases such as the present instance, we can do no better than recall to mind the words uttered by Lord Diplock during his speech in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191, 220:

> Before adverting to the evidence that was before the learned Judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate Court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court Judge by whom the application for it is heard. Upon an appeal from the Judge's grant or refusal of an interlocutory injunction the function of an appellate Court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate Court would have exercised the discretion differently. The function of the appellate Court is initially one of review only. It may set

aside the Judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the Judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the Judge made his order that would have justified his acceding to an application to vary it. Since reasons given by Judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the Judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable Judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate Court has reached the conclusion that the Judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR of why the Court of Appeal was entitled to ignore that Judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence 'so virtually we have to consider it all afresh.'

My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the Judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate Court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the Judge for his decision. Only if they do, is the appellate Court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions.

The appellant has failed to discharge the burden imposed upon him by law by establishing those circumstances that entitle appellate interference. On the contrary, we are satisfied that the learned Judge exercised his discretion correctly and in accordance with settled principles. He appreciated the evidence judicially, took into account all relevant considerations and directed himself accurately upon the relevant law.

For the reasons given, we dismissed the appeal. The orders made by the learned Judge were affirmed. The appellant was ordered to bear all the costs occasioned by this appeal and the deposit paid into Court was directed to be paid out to the respondents to account of their taxed costs. An order for early trial was also made.

Reported by Michele Saw